

PROSECUTOR PARTICIPATION IN CRIMINAL MEDIATION: LEGAL REGULATION, CHALLENGES, AND WAYS TO OVERCOME THEM

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Abstract

The article reveals general theoretical and practical issues of the prosecutor's role in criminal mediation. The author describes scientific and legal approaches to defining the concept of "mediation." Based on an analysis of current legislation, the author reveals aspects of the prosecutor's participation in restorative justice practices and his role in concluding agreements between the parties. Despite the existing legislation, the author notes a number of legal conflicts and practical problems regarding the role of the prosecutor in criminal mediation. In particular, the author emphasizes the conflict between confidentiality and public interest, as well as the problem of determining the voluntariness of the parties. In addition, the author notes practical obstacles to the implementation of criminal mediation, which stem from cultural characteristics and inadequate information. The novelty of the article lies in the comprehensive recommendations provided by the author for solving the identified problems, in particular, specific legislative changes to the Criminal Procedure Code of Ukraine. The author also emphasizes the need to implement educational programs and practices to inform the public about the benefits of mediation. The general comprehensive recommendations form a coherent concept for improving the effectiveness of the prosecutor's role in domestic restorative justice practices.

Keywords: criminal mediation; prosecutor; legal regulation; mediation; public interest; voluntariness; restorative justice; law enforcement.

Introduction

In recent decades, the global discourse on criminal justice has gradually shifted toward more restorative approaches that focus not only on punishment but also on repairing the harm caused by crime, reintegrating the offender into society, and healing the victim. Restorative justice (RJ) seeks to humanize legal proceedings by encouraging voluntary participation, dialogue, and mutual understanding between the parties. Among its key mechanisms is criminal mediation, which aims to resolve conflict by enabling constructive communication between the victim and the offender in a safe and regulated environment. The overarching goal is to restore social balance rather than merely impose retribution. While restorative justice has received increasing attention in various legal systems, the practical implementation of criminal mediation, especially the role of the prosecutor in such procedures, remains a matter of significant legal and scholarly concern (Lapkin, 2011).

Ukraine, in its ongoing process of harmonizing national legislation with European standards, has begun incorporating the principles of restorative justice into its legal system. These developments are in line with international recommendations such as the Council of Europe Recommendation (2018) concerning restorative justice in criminal matters, which encourages states to integrate restorative mechanisms into formal criminal proceedings. Nevertheless, the adaptation of such models within Ukrainian criminal justice faces conceptual, institutional, and practical challenges. One of the

central issues is the lack of clarity and consistency in defining the role of the prosecutor in criminal mediation. Prosecutors, traditionally seen as representatives of the state and guardians of public interest, are now required to act not only as litigators but also as facilitators—or at least endorsers—of non-punitive forms of justice. This transformation raises a set of pressing questions: How should prosecutors engage in mediation? What legal frameworks guide their involvement? How can their role be reconciled with the principles of voluntariness, neutrality, and confidentiality inherent in mediation?

This article is driven by the growing necessity to address these questions and to explore the legal and practical implications of prosecutorial participation in criminal mediation within Ukraine's legal system. Despite legislative attempts to introduce mediation as a formal component of criminal proceedings—such as amendments to the Criminal Procedure Code of Ukraine and the Law of Ukraine on Free Legal Aid—a clear and comprehensive regulation of the prosecutor's role remains lacking. Often, mediation is conducted under vague procedural guidelines, resulting in inconsistent practices and the risk of undermining the very principles on which restorative justice is built.

The existing scholarly literature provides valuable insights but has not yet comprehensively examined the multidimensional position of the prosecutor in restorative justice processes. For instance, I.V. Hlovyuk and S.V. Andrusenko note the risks associated with excessive prosecutorial influence over mediation outcomes and the absence of clear benchmarks for evaluating public interest in such contexts. T.H. Fomina highlights the fragmented nature of current legal regulation, while K.O. Chumak underscores the ambiguity surrounding voluntariness and the informed consent of the parties. Furthermore, N.O. Turman (2018) emphasize the lack of professional training and legal awareness among mediation participants, including prosecutors. Although scholars such as V.O. Hryniuk, P.D. Denysiuk (2021), O.V. Katsiora, A.V. Lapkin (2011), and others have contributed to the discussion, a systematic and analytical study focusing specifically on the prosecutor's functions, legal status, and ethical obligations in mediation is still absent. This gap forms the conceptual foundation of the present research.

The theoretical basis of this article draws on a combination of legal positivism and principles of restorative justice theory. Legal positivism allows us to explore the existing regulatory framework and its internal consistency, while restorative justice theory—rooted in the works of Howard Zehr and John Braithwaite—emphasizes the importance of dialogue, victim-offender reconciliation, and the transformation of legal roles. According to Zehr, restorative justice challenges the traditional punitive paradigm by shifting the focus from "what law was broken and what punishment is deserved" to "who was harmed and how can that harm be repaired." In this light, the role of the prosecutor must be reconceptualized not as a passive observer or gatekeeper but as an active participant capable of facilitating, or at least not obstructing, restorative dialogue. This theoretical lens provides a framework for analyzing the institutional tensions between state interests and the individualized justice promoted by mediation.

Given this context, the purpose of the article is to conduct a comprehensive analysis of the legal regulation of the prosecutor's participation in criminal mediation in Ukraine. The article also aims to identify key theoretical and practical challenges, assess the degree of alignment between existing regulations and restorative justice principles, and propose concrete solutions—both legislative and institutional—to improve the efficacy of prosecutorial involvement in mediation. Particular attention is paid to the tension between confidentiality and public interest, the problem of determining the voluntariness of the parties, and cultural or procedural barriers that hinder broader application of mediation practices.

Accordingly, the objectives of the study are as follows:

- To examine the normative framework regulating the prosecutor's

participation in criminal mediation.

- To assess the compatibility of prosecutorial functions with the principles of restorative justice.
- To identify legal conflicts and institutional challenges arising from prosecutorial involvement in mediation.
- To propose specific amendments to the Criminal Procedure Code of Ukraine that would enhance the effectiveness of mediation.
- To formulate practical recommendations for training prosecutors and informing the public about the benefits of restorative justice.

The central hypothesis of this article is that the absence of clear legal guidelines and theoretical clarity regarding the prosecutor's role in criminal mediation contributes to procedural inconsistencies, undermines voluntariness, and limits the transformative potential of restorative justice in Ukraine. Furthermore, it is hypothesized that with adequate legal reform and institutional support—including improved education and awareness—prosecutors can become effective agents of restorative justice rather than passive or obstructive actors.

From a methodological standpoint, this study employs an interdisciplinary approach, combining formal legal analysis with comparative legal research, systemic analysis, and interpretive methods. The study analyzes Ukrainian legislation and judicial practice, juxtaposing them with best practices and legal standards from other jurisdictions that have successfully integrated restorative justice into their criminal justice systems. This approach allows for the identification of both structural gaps and promising directions for reform.

This article will be of interest to a wide audience, including legal scholars, practitioners, lawmakers, and restorative justice advocates, as it addresses a timely and underexplored aspect of criminal procedure. By shedding light on the prosecutor's role in mediation and offering actionable solutions, the article contributes to the broader discourse on the modernization and humanization of criminal justice in Ukraine and beyond.

Results and Discussion

Modern Ukrainian criminal justice is gradually moving away from the traditional punitive model. In this context, criminal mediation is increasingly regarded as an effective tool for transforming approaches to conflict resolution. As P.D. Denysiuk aptly notes, the punitive-repressive model of justice is losing its effectiveness. These changes emphasize the need to introduce alternative procedures, including mediation. Mediation has an interdisciplinary nature and is aimed at encouraging the involvement of both parties. It provides the victim with an opportunity to receive appropriate compensation and to express their views, while offering the offender a chance for proper resocialization, provided that the terms of the mediation are fulfilled. However, the full-scale implementation of restorative justice practices requires thorough theoretical reflection and appropriate legal regulation (Denysiuk, 2021).

In the works of Ukrainian scholars, criminal mediation is conceptualized as an institution developing within the framework of restorative justice. Its essence lies in giving humanistic content to traditional criminal justice. According to this concept, every offense gives rise to the offender's obligation to remedy the harm caused. Therefore, it is the task of the state and society to create the proper conditions for this to occur.

This model receives further elaboration in the work of T.H. Fomina, who emphasizes that mediation adds a "healing dimension" to traditional criminal proceedings. That is, the victim receives actual moral and material compensation, while the offender gains a real opportunity for resocialization. In the author's view, mediation helps reduce social tension between the parties and improves the protection of victims' rights (Fomina,

2022).

The practical implementation of this approach is explored by A.A. Dmytrenko and M.R. Mazur, who define criminal mediation as a structured process with clearly delineated stages and rules. Within this procedure, the parties to the conflict—assisted by a neutral third party—reach a mutually acceptable agreement that considers their individual interests (Dmytrenko, 2022; Mazur, 2023).

Ukrainian scholar V.S. Sirko defines mediation as a method of alternative dispute resolution that involves the participation of a neutral third party. Unlike litigation, mediation is based on the principles of voluntariness, confidentiality, mutual understanding, and cooperation. Unlike a judge, a mediator does not make decisions for the parties but facilitates dialogue between them. According to the author, this approach helps reduce time and resource expenditures and allows the individual needs of each participant to be taken into account (Sirko, 2024).

According to paragraph 4 of Article 1 of the Law of Ukraine "On Mediation" (2019), mediation is defined as "a voluntary, confidential, and structured process whereby the parties, with the assistance of a mediator, seek to prevent or resolve a conflict (dispute) through negotiations." The law explicitly states that it applies to criminal relations, particularly during the conclusion of reconciliation agreements (Law of Ukraine No. 1875-IX..., 2022).

Thus, despite the diversity of approaches and terminological emphases, scholars broadly agree on the essence of criminal mediation: it is a voluntary, confidential, and structured extrajudicial procedure aimed at remedying harm and achieving agreement between the victim and the offender.

It is important to emphasize that the main participants in mediation are the conflicting parties and the mediator. However, it is equally important to consider the role of other actors in criminal proceedings, particularly the prosecutor. The prosecutor's participation in criminal mediation derives from their function of upholding public prosecution. At the same time, it reflects the restorative character of contemporary criminal justice. At the legislative level, the prosecutor's involvement is based on the provisions of Chapter 35 of the Criminal Procedure Code of Ukraine (CPC) of 2001. Articles 469–472 of the CPC govern the procedure for concluding and approving a reconciliation agreement (Criminal Procedure Code of Ukraine, 2001). These articles are also connected to the broader principles of public interest laid out in Article 121 of the Constitution of Ukraine (1996) and Article 2 of the Law of Ukraine "On the Prosecutor's Office" (2014) (Constitution of Ukraine, 1996; Law of Ukraine No. 1697-VII..., 2014). According to part 7 of Article 474 of the CPC, the prosecutor is obligated to verify that the agreement is voluntary, justified, and in line with public interest. Only after performing these checks may the prosecutor petition the court for its approval (Criminal Procedure Code of Ukraine, 2001). This legal framework suggests that the prosecutor plays a pivotal role in balancing the restorative and public dimensions of justice.

At the doctrinal level, scholars consider the prosecutor's role in mediation through the lens of two groups of powers. On one hand, the prosecutor has an informational function, which includes informing the parties about the possibility of using restorative justice mechanisms and explaining the consequences of reconciliation (Turman, 2018). On the other hand, the prosecutor performs an evaluative function. The law entrusts them with assessing the legality, voluntariness, and proportionality of the proposed terms. In this context, K.O. Chumak rightly points out that the content of an agreement between the parties may remain superficial without proper prosecutorial scrutiny (Chumak, 2016). Therefore, we can define the prosecutor's role as twofold: informing the parties and evaluating the reconciliation agreement they have reached.

It is also worth noting that the prosecutor's role may change significantly depending on the stage of the criminal process. At the pre-trial stage, for example, the prosecutor may inform the parties about restorative justice mechanisms and propose reconciliation

(Turman, 2018). Once the parties agree on a draft agreement, the prosecutor submits it to the court and provides their opinion on whether the agreement serves the public interest. At the trial stage, the prosecutor is empowered to either support or oppose the approval of the agreement.

However, this is where the first serious issue arises. The prosecutor may not be present during the mediation sessions, as this would violate the principle of confidentiality. Therefore, the prosecutor has no direct access to the content or dynamics of the negotiations. This problem is symptomatic of a broader tension in restorative justice. Confidentiality is a cornerstone of mediation, but it raises concerns about fairness and undue influence once the agreement is finalized. In this article, we focus specifically on the issue of the prosecutor's non-participation in the negotiation process. As a result of mediation, the prosecutor receives a signed agreement that they must evaluate for voluntariness and for the adequate protection of the victim's interests. Yet, not being present during the negotiations substantially limits the prosecutor's ability to make an informed judgment.

Ukrainian scholar V.O. Hryniuk highlights this asymmetry, emphasizing that the prosecutor has "limited capacity" to control the content of the agreement due to their absence from the discussions. Often, the prosecutor must rely solely on their subjective perception of the agreement's adequacy (Hryniuk, 2016).

Recognizing the fundamental importance of confidentiality, this issue nevertheless presents a serious obstacle to the effective integration of restorative justice practices into the domestic legal system. As a potential solution, we propose the establishment of a transparent mechanism for communication between the mediator and the prosecutor that does not compromise the confidentiality of the process. First, it is advisable to amend the procedural aspect of mediation. Since only the mediator has full access to the negotiation process, it is logical to assign them the responsibility of confirming the voluntariness of the agreement. To that end, we propose the introduction of a "Mediator's Explanatory Memorandum"—a standardized form signed by both the mediator and the parties, affirming the voluntary nature of participation, the balance of the agreement, and respect for the victim's rights, without disclosing any confidential details. This memorandum should be submitted to the prosecutor within three days after the mediation concludes. This timeline ensures the necessary level of procedural oversight while preserving the non-interventionist nature of mediation. Because this procedural innovation is a substantive change, it must be codified in law. We propose the addition of a new Article 470¹ to the Criminal Procedure Code of Ukraine, titled "Mediator's Explanatory Memorandum," outlining its legal status, content, and use in verifying the voluntariness and legality of the agreement. Among its key provisions: the memorandum must exclude any factual information about the offense or the negotiations, and must include general procedural information, statements confirming voluntariness and absence of pressure, and confirmation of confidentiality compliance. The memorandum would be appended to the reconciliation agreement and used solely for verifying its legal validity. If the memorandum contains any confidential details, courts would be obliged to exclude them as inadmissible evidence.

This innovation may partially resolve the conflict between the confidentiality of negotiations and the prosecutor's duty to ensure adequate protection of the victim's rights. Additionally, to strengthen verification of voluntariness, the prosecutor should be granted a procedural right to ask clarifying questions during a closed court session. This would allow them to confirm the absence of coercion or manipulation and strengthen procedural fairness. In this model, the prosecutor's absence from the mediation session is compensated by formalized documentary evidence of voluntariness and the opportunity for targeted procedural review. Thus, the prosecutor retains meaningful oversight powers without undermining the informality and confidentiality that are essential to restorative justice. In this same context, it is necessary to highlight another problem:

the conflict between the public interest, which the prosecutor is mandated to defend, and the will of the parties seeking reconciliation. As mentioned above, Chapter 35 of the Criminal Procedure Code entrusts the prosecutor with the duty to verify the legality and voluntariness of the agreement. However, the prosecutor is also empowered to reject an agreement that “does not meet the interests of society” (Criminal Procedure Code of Ukraine, 2001). While this provision is intended to protect the public interest, the concept itself is formulated too abstractly. Ukrainian scholars I.V. Hlovyuk and S.V. Andrusenko have stressed that the prosecutor’s position is often decisive in whether a reconciliation agreement receives judicial approval. Yet the absence of clear criteria creates the risk of excessive interference and, in effect, the blocking of voluntary settlements (Andrusenko & Hlovyuk, 2015). It is worth noting that the Supreme Court addressed this issue in Case No. 756/11661/17 (2018), clarifying that public interest is considered respected when the rights and legitimate interests of the conflict participants—primarily the victim—are protected (Resolution of the Supreme Court, 2018). This guidance underscores the importance of ensuring the victim’s interests are respected, which again brings attention to the confidentiality dilemma. The ruling supports the rejection of agreements where these interests are not upheld but does not eliminate the legislative vagueness entirely.

Resolving this dilemma requires legislative clarification. We propose amending Article 474 of the CPC of Ukraine to define specific circumstances under which reconciliation is objectively contrary to public interest. These may include: the presence of serious recidivism; direct threats to life or health; or a gross imbalance between the harm caused and the compensation offered. This list should not be exhaustive, but its very existence would significantly reduce subjectivity and improve the protection of public interest.

Importantly, the prosecutor’s role is not limited to procedural oversight. According to Recommendation R(99)19 of the Committee of Ministers of the Council of Europe (1999), prosecutors are expected to play a broader strategic role by promoting the implementation of restorative justice practices (Recommendation No. R(99)19, 1999). In the context of Ukrainian law, this means balancing punitive and restorative paradigms. Prosecutors must actively contribute to the expansion of mediation and reconciliation agreements.

However, this broader strategic role reveals yet another pressing problem: the psychological unpreparedness of prosecutors and participants for restorative processes. Moreover, public awareness of restorative justice remains limited. Institutionally, many prosecutors still operate within a strictly punitive framework. Mediation is not viewed as a public good but rather as a form of leniency. In the early years of reconciliation agreement implementation, prosecutors frequently objected to their approval. Professional biases remain a significant obstacle, with many perceiving restorative practices as undermining the authority of criminal justice (Laundra, 2022).

Overcoming this challenge requires more than legal reform—it demands a shift in public and institutional mentality. Foremost, this involves awareness-raising among both the general population and legal professionals. Law school curricula should include mandatory modules on restorative justice. National public education campaigns should be implemented to highlight the benefits of mediation. Furthermore, A.V. Lapkin proposes the introduction of preparatory sessions prior to mediation, during which the mediator—with the involvement of the prosecutor—explains the essence of the process, its rules, and potential outcomes (Lapkin, 2011). Only a holistic combination of education and structured participant preparation can increase acceptance and successful implementation of restorative justice practices in Ukraine.

Conclusion

Criminal mediation is a voluntary, confidential, and structured extrajudicial procedure aimed at addressing harm and achieving consensus between the victim and

the offender. Within the context of mediation, the prosecutor assumes informational, evaluative, and strategic roles. The informational role involves informing the parties about the possibility of applying restorative justice practices. The evaluative role concerns the assessment and approval of the agreement reached between the parties. The strategic role, as outlined in the Council of Europe's Recommendation, relates to the broader promotion and institutionalization of criminal mediation.

Despite existing legal regulation, the practical involvement of the prosecutor in mediation remains fraught with a number of challenges. First and foremost, the prosecutor is not a direct participant in the negotiation process between the parties. Consequently, they are unable to independently verify the voluntariness of the agreement or ensure the adequate protection of the victim's rights. To resolve this contradiction—while upholding the principle of confidentiality—it is proposed to amend the Criminal Procedure Code of Ukraine to introduce a Mediator's Explanatory Memorandum.

Another legal inconsistency pertains to the need to respect the principle of public interest. To eliminate subjectivity in the prosecutor's decision-making, it is recommended to establish a clear list of grounds within the Criminal Procedure Code that would preclude mediation in certain cases.

Finally, in order to fulfill the prosecutor's strategic role and support the wider application of restorative justice, it is proposed to conduct large-scale public awareness campaigns aimed at explaining the benefits of mediation.

In conclusion, the implementation of these comprehensive reforms is intended to minimize legal ambiguities and foster the broader use of restorative justice practices in Ukraine.

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